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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 235

GEORGE V. TAWES,

Petitioner,

vs.

CIE. DES MESSAGERIES MARITIMES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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CIE. DES MESSAGERIES MARITIMES

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petitioner, George V. Tawes, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

I. Statement of the Matter Involved

The issues presented to this Court are:

(1) Was the trial judge in error in finding that the proximate cause of plaintiff's injury was a negligent act or omission on the part of the defendant's agents.

(2) Was the trial judge in error in arriving at the conclusion that the proximate cause of plaintiff's injury was a negligent act or omission on the part of the defendant by means of the application of the rule of *res ipsa loquitur*.

This case is an action at law brought by George V. Tawes, a ship's pilot in the service of the Panama Canal. He was assigned to the steamship GRENOBLE to pilot the vessel in its transit through the Panama Canal. He boarded the vessel at Balboa by means of a step-ladder consisting of four steps which was furnished by the ship's crew. On reaching the Gatun locks, the vessel tied up and Tawes went ashore by means of the same ladder on which he had boarded to check the forward draft. The ladder remained at the same place at the same position during the transit from Balboa to Gatun. After Tawes had used the ladder in disembarking and was on the wharf, the boatswain adjusted the ladder by lifting it upward. When Tawes undertook to use that same ladder to reboard the ship, the ladder fell throwing Tawes to the ground and thereby injuring him. The District Court under those facts applied the rule *res ipsa loquitur* and found in favor of Tawes. The trial was by the District Judge and without a Jury.

The Defendant appealed to the United States Court of Appeals for the Fifth Circuit, which Court reversed the District Judge holding that it was error to invoke the rule *res ipsa loquitur* on this record.

A petition for rehearing was filed, pointing out to the Court of Appeals that the holding was contrary to the opinion of the Supreme Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 US 46. This petition for rehearing was denied on the 14th day of July, 1953.

II. This Court Has Jurisdiction

This Court has jurisdiction as there can be no further proceedings in the Court of Appeals for the Fifth Circuit

or in the District Court. This Court has explicit authority to review by certiorari such a judgment (28 USC 1254) and this Court has properly allowed the writ of certiorari in the same situation in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46.

III. Questions Presented

There was a finding of negligence on the part of the respondent by the District Judge.

On the record of the case, the District Judge correctly applied the doctrine of *Res Ipsa Loquitur* in finding for petitioner.

The Circuit Court of Appeals for the Fifth Circuit's decision is contrary to the Supreme Court's decision in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46 and is contrary to the Ninth Circuit Court's decision in *United States Lines* v. *Cummings,* 195 Fed. 2d 291.

IV. Reasons Relied upon for Allowance of Writ

(1) The decision of the Court of Appeals for the Fifth Circuit is contrary to the holding of this Honorable Court in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46.

(2) The Circuit Court of Appeals for the Fifth Circuit has misapplied the cases of *Sweeney* v. *Erving,* 228 U. S. 233, and *San Juan Light Co.* v. *Requena,* 224 U. S. 89.

(3) The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings,* 195 Fed. 2d 291.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit com-

manding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket #13,921, *Cie. Des Messageries Maritimes* v. *George V. Tawes,* Appellee, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Opinion of the Court Below

The opinion in the United States Court of Appeals for the Fifth Circuit (R. 256) has not yet been reported.

II. Jurisdiction

The date of the judgment of the United States Court of Appeals for the Fifth Circuit to be reviewed is June 18, 1953 (R. 260).

1. Rehearing was denied by that Court on the 14th day of July, 1953, (R. 264).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. 1254.

3. The cases believed to sustain the jurisdiction of this Court are as follows:

Johnson v. *United States,* 68 S. Ct. 391, 333 US 46.
Jesionowski v. *Boston & M. R. Co.,* 67 S. Ct. 401, 329 US 452.
Lavender v. *Kurn,* 66 S. Ct. 740, 327 US 645.
Seas Shipping Co. v. *Sieracki,* 66 S. Ct. 872, 328 US 85.

III. Statement of the Case

On July 21, 1949, the petitioner, George V. Tawes, a Panama Canal pilot, upon the reglementary request of the agent of the steamship GRENOBLE for a pilot, was assigned by the Panama Canal to the transit of the said ship through the Panama Canal from Balboa, the Pacific terminal, to Cristobal, the Atlantic terminal.

Petitioner, with his Panama Canal crew of thirteen men, boarded the vessel at Balboa by means of a gangway leading from the dock to a stepladder connecting the starboard gunwale to the deck. Upon arriving at the locks at Gatun the GRENOBLE tied up starboard side to the lock wall, the top of the gunwale protruding about eighteen inches above the fender separating the ship from the wall. The stepladder was in the same position as during the boarding at Balboa.

While the ship was so secured at Gatun appellee disembarked by means of the stepladder onto the lock wall. During petitioner's absence after his disembarkation, which lasted for about from two to ten minutes, the boatswain of the GRENOBLE altered the position of the stepladder with regard to its position of contact with the gunwale. Appellee reembarked by stepping from the gunwale onto the stepladder. As soon as appellee affirmed both feet on the step-

ladder, the ladder slid away from the gunwale and out from under appellee, causing appellee to fall to the deck, sustaining the injuries that are the subject of his suit for damages.

The District Court Judge in his opinion held as follows:

"This record contains no facts establishing that the injuries received by Tawes were the result of or produced by any contributing negligence of Tawes, or of any voluntary assumption of risks outside the scope of his duties as Pilot of the Grenoble.

Counsel for Defendant contends that Plaintiff's right of recovery should be denied on the basis that 'there is no evidence of any negligence on the part of Defendant.'

The record in this case established that the ladder in question was the property of and was under the control of the Defendant. The ladder had been placed by Defendant for the use of plaintiff at Balboa. The ladder remained at the same place and in the same position during the transit of the Grenoble from Balboa to Gatun. When the Grenoble tied up at Gatun it was next to the lock wall and on the starboard side. The top of the gunwale was even or level with the Canal wall. Other members of the Canal crew disembarked from the Grenoble to the lock wall by stepping on top of the bitts. The ladder was a short distance from the bitts. Tawes instead of stepping on bitts used the ladder. After Tawes had used the ladder and was on the lock wall, the Boatswain of the Grenoble adjusted the ladder by lifting it upwards. That adjusting of the ladder by the Boatswain was not denied. The Boatswain was in position to see and evidently did see Tawes use the ladder in disembarking, and it is reasonable to assume that the Boatswain should have known that he (Tawes) would use it in reboarding the ship. When Tawes undertook to use that same ladder to reboard the ship, the

ladder from some unexplained cause fell, throwing Tawes to floor of deck. It is testified to by members of the Canal crew and crew of the Grenoble that the ladder with Tawes on it did fall, and that he received injuries as a result thereof.

Under those facts, and under the elementary principles of law, the rule of *Res Ipsa Loquitur* applies. Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on Defendant. Defendant offered no proof to meet that burden, and in view of such failure the liability of Defendant has been sustained" (R. 25, 26).

Under the above set of facts and in spite of the above holding of the District Judge, the Court of Appeals reversed saying that it was error for the District Court to apply the doctrine *Res Ipsa Loquitur* on this record and that it was error for the District Court to hold that under that principle of law the burden of refuting any negligence causing the ladder to fall rested on respondent.

It is to reverse this holding of the Court of Appeals that these writs are applied for.

IV. Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in reversing the Judgment of the District Court for District of the Canal Zone.

2. The Court of Appeals further erred in holding that it was error for the District Court to apply the rule of *Res Ipsa Loquitur.*

3. The Court of Appeals also erred in holding that respondent met burden of explanation required under the doctrine of *Res Ipsa Loquitur.*

4. The Court of Appeals erred in that it misapplied the

cases of *San Juan Light Company* v. *Requena*, 224 U. S. 89, and *Sweeney* v. *Erving*, 228 U. S. 233.

5. The Court of Appeals erred in holding that the trial judge made no finding of negligence on the the part of the respondent proximately causing petitioner's injuries.

V. ARGUMENT

Summary of Argument

POINT A.—THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

POINT B.—THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN UNITED STATES LINES VS. CUMMINGS 195 F. 2D 221.

POINT C.—TRIAL JUDGE DID FIND THAT THERE WAS NEGLIGENCE ON THE PART OF RESPONDENT PROXIMATELY CAUSING PETITIONER'S INJURIES.

Point A

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With the Decisions of the Supreme Court of the United States.

The opinion rendered by Judge Borah in this matter relies upon the cases of *Sweeney* v. *Erving*, 228 U. S. 233, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89, for the law on the doctrine of *Res Ipsa Loquitur*. Neither of these cases is a maritime case. Since the case at bar is a maritime one, in considering it, we must bear in mind the doctrine laid down in *Seas Shipping Co.* v. *Sieracki*, 66 Sup. Ct. 872, 328 U. S. 85, wherein this Court said:

> "These and other considerations arising from the hazards which maritime service places upon men who

perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Souther S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S. 1157; Carlisle Packing Co. v. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

The Court of Appeals has obviously misapplied the *San Juan Light Company* and *Sweeney* cases, *supra,* as they have not taken into account this Court's decision in the case of *Johnson* v. *United States,* 68 S. Ct. 391, 333 U. S. 46. The *Johnson* case stands for the proposition that under the Jones Act the doctrine of *Res Ipsa Loquitur* is applicable to acts of a fellow servant. The Court of Appeals completely ignored this holding by this Honorable Court and by so doing has rendered a decision contrary to the decision of the *Johnson* case.

In the *Johnson* case, Johnson's shipmate, one Dudder was standing above Johnson. It was his duty to hold a block. He permitted the block to fall hitting Johnson on the head. Just as in the case at bar it was not certain why the ladder fell, so in the *Johnson* case this Court said "it is not certain why the block fell". 68 S. Ct. @ 393. The Court of Appeals in the *Johnson* case reversed feeling that Johnson might have pulled the block out of Dudder's hand. The Court of Appeals in the case at bar had no theory as to how the accident occurred. Mr. Justice Douglas on the above facts held as follows:

"But where, as here, the injured person is not implicated (Jesionowski v. Boston & Maine R. Co., supra),

> the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent."

In the case at bar, the injured person, Tawes, was not implicated and therefore the falling of the ladder is alone sufficient basis for an inference that the man who adjusted the ladder was negligent. However, the Court of Appeals in its decision, instead of following the majority opinion of the *Johnson* case and finding there was sufficient basis for an inference of negligence, used almost the exact language of the dissenting opinion in the *Johnson* case, saying:

> "Since we cannot on this record determine how the injury to appellee occurred—it certainly was not established why the ladder fell—we are compelled to hold that the appellee failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to appellant's negligence."

This is almost word for word the language used by Justice Frankfurter in 68 S. Ct. at 395.

The majority opinion in the *Johnson* case however held as follows:

> "The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent."

It is obvious therefore that the holding in the case at bar is contrary to the holding of the *Johnson* case as the inquiry in our case is not how the injury occurred but whether a showing that Tawes was without fault (R. p. 25) and was injured by the falling of the ladder is the basis of a fair inference that the man who adjusted the ladder was negligent.

The District Court found that it is and its judgment should not be disturbed unless it is clearly erroneous.

United States v. *U. S. Gypsum Co.*, 68 S. Ct. 525, 333 U. S. 364. We think that the record also shows that it clearly is, for the record shows that the ladder was used, not only by Tawes, but by others several times before it was moved by the boatswain. It was moved by the boatswain and the next man to step on it, Tawes, fell. The fact that it did not fall before the boatswain moved it but did on its first use afterwards seems to be conclusive evidence that the boatswain did not adjust it properly and at the very least would form the basis of a fair inference that the boatswain was negligent. As in the *Johnson* case the negligent employee, the boatswain, was not called as a witness.

The Court of Appeals found that the respondent had met the burden of explanation by "offering the ladder in evidence and by producing witnesses whose testimony tended to rebut any inference of negligence on its part". The ladder was produced in evidence but all that the witnesses testified to in regard to that ladder was that it was the same ladder on which Tawes fell. In other words, they identified the ladder. This evidence went no further than to show that there was no defect, latent or otherwise, in the ladder. It certainly does not explain or refute at all the fair inference of the negligence of the boatswain mate in adjusting the ladder. In other words, contrary to the holding in the *Johnson* case, the Court of Appeals did not apply doctrine of *Res Ipsa Loquitur* to the acts of the fellow servant, the boatswain, but narrowly held that since there was no defect in the ladder this was an unavoidable accident. In view of the fact that the boatswain adjusted the ladder right before Tawes fell, this holding is obviously incorrect. As we have pointed out above, the case was tried without a Jury and therefore the trial judge was the trier of the facts. As such, he is entitled to draw upon any logical inferences he saw fit in arriving at the conclusion that the defendant's negligence was the proximate cause of petitioner's injury.

If there is evidence to support his findings, the judgment is not reversible, since it is a firm principle of law that the judgment of a District Court should not be reversed unless it is clearly erroneous. *U. S.* v. *Gypsum Company*, 333 U. S. 364, 68 S. Ct. 525; *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177. This doctrine is well stated by Mr. Justice Murphy in the case of *Lavender* v. *Kurn, et al.*, 327 U. S. 645, 66 Sup. Ct. 740, wherein he stated:

> "(4-6) It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

There was not, of course, a complete absence of probative facts to support the trial judges conclusion. He enumerated those facts in his opinion (R. 23 *et seq*). That evidentiary basis having become apparent, it is immaterial that the Court of Appeals might draw a contrary inference. Its function is exhausted at that point.

Therefore in spite of the repeated holdings of the Supreme Court of the United States laying down this principle, the Court of Appeals reversed the trial judge's decision here; a decision which was far from being clearly erroneous. This district judge's decision is in fact a correct decision as

it is a decision completely in line with the many holdings of this Court and particularly with *Johnson* v. *United States, surpa.*

POINT B

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With the Decision of the Court of Appeals for the Ninth Circuit in United States Lines v. Cummings, 195 F. 2d 221.

The decision of the Court of Appeals is also contrary to the decision of the Court of Appeals for the Ninth Circuit in the case of *United States Lines* v. *Cummings,* 195 F. 2d 221. The facts in that case were the same as here. A pilot was attempting to board a ship. The first approach of the launch was unsuccessful. After this approach the ladder was raised for inspection and then lowered to the water. The next approach was successful, but when the pilot stepped on the ladder, it played out and dropped about two feet, injuring him. The defendant contended that the accident happened due to the launch crushing plaintiff's foot. The District Court found that it was not an unavoidable accident but was the result of the ship's negligence. This was affirmed on appeal.

The District Court in that case as here adopted the theory of the accident as contended for by the pilot and found that the danger was not obvious or apparent; that appellee assumed no risk; that appellee was not contributorily negligent; and that it was not an unavoidable accident and was the result of the ship's negligence. The Court said that the appellant with considerable logic argued that the injuries resulting from the accident could hardly have followed the happenings as described by the pilot. However, the Court said that they could not say its findings were clearly erroneous and so affirmed the District Court.

There was no more direct proof of negligence in the *Cummings* case than there was here. But in the *Cummings* case the Court found that it was not an unavoidable accident. Under the same set of facts in the case at bar the Court has obviously found that the falling of the ladder was an unavoidable accident. However, this same Fifth Circuit in *Johnson* v. *Macias,* 193 F. 2d 475, said that an "unavoidable accident is one which is not occasioned in any degree, directly or remotely, by lack of due care." The Court in that case also said:

> "There is no evidence here tending to show that plaintiff's injuries resulted from any cause other than negligence on the part of some one. The issue of unavoidable accident is therefore not presented."

There is absolutely no evidence here tending to show that Tawes' injuries resulted from any cause other than negligence on the part of the boatswain. How then can this be said to have been an unavoidable accident? The answer, of course, is that the accident was avoidable by the exercise of reasonable prudence by the boatswain in his adjustment of the ladder. If he had exercised due care in that adjustment the ladder would not have fallen. This is proven by the fact that it did not fall when used before the adjustment was made but did fall on its first use after the adjustment. The injury to petitioner therefore would have been avoided by use of due care and was not the result of an "unavoidable" accident. This is particularly so when viewed in light of the fact that this Court has held that the maritime service requires a higher degree of care than any other service. *Seas Shipping Co.* v. *Sieracki,* 66 S. Ct. 872, 328 U. S. 85. It therefore cannot be said that this accident was an unavoidable one; one not occasioned in any remote degree by lack of due care.

The Court of Appeals therefore has misapplied the doctrine of *Res Ipsa Loquitur* by reversing the district judge's finding that this accident was avoidable and that there was a fair inference of negligence on the part of the boatswain which was unexplained. In so doing that Court has rendered a decision directly in conflict with *Johnson* v. *United States, supra,* and *United States Lines* v. *Cummings,* 195 F. 2d 221.

POINT C

Trial Judge Did Find That There Was Negligence on the Part of Respondent Proximately Causing Petitioner's Injuries.

The Court of Appeals held that the trial judge made no finding of a negligent act or omission on the part of the defendant proximately causing petitioner's injury but that he found liability from the fact of the injury alone. The trial judge held as follows:

> "Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on defendant. Defendant offered no proof to meet that burden, and in view of such failure, the liability of defendant has been sustained."

The trial judge therefore held that the defendant offered no proof to meet the burden of refuting any negligence causing the ladder to fall. Therefore there must have been made out a *prima facie* case of negligence by the plaintiff or there would have been no negligence to refute. The trial judge therefore having found *prima facie* negligence causing the falling of the ladder, the burden of going forward with the evidence shifted to the defendant; that burden being to destroy the preponderance of plaintiff's evidence, which had established a *prima facie* case, by evidence show-

ing lack of negligence on defendant's part or lessening the probative force of plaintiff's evidence.

Therefore it is submitted that the trial judge did find negligence on the part of the defendant or there would have been no necessity for his referring to the fact that the defendant offered no proof to meet the burden of refuting negligence upon his part.

Conclusion

The Circuit Court of Appeals has decided this case in direct conflict to *Johnson* v. *United States, supra,* in that it has not applied the doctrine of *Res Ipsa Loquitur* to the acts of a fellow servant. The *Johnson* case held that the doctrine was so applicable. The Circuit Court of Appeals ignored this holding.

In spite of the fact that the holding of the District Judge was not clearly erroneous but was in fact in conformity with the *Johnson* case, he was reversed and this is contrary to *United States* v. *U. S. Gypsum Co.,* 68 S. Ct. 525, 333 U. S. 364, and *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 St. Ct, 177.

The facts in this case are the same as in *United States Lines* v. *Cummings,* 195 F. 2d 291. In the *Cummings* case the Ninth Circuit allowed the plaintiff to recover. In this case the Fifth Circuit held that the plaintiff was not entitled to recover. Thus Tawes has taken from him any recompense for his injuries due to the fact that his appeal lay to the Fifth instead of the Ninth Circuit.

Contrary to the findings of the Circuit Court of Appeals the District Judge did make a finding of negligence on the part of the defendant.

In conclusion, we should like to again point out that this pilot, Tawes, was in the service of the ship. The case of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872,

held that liability of the shipowner is not limited by conceptions of negligence. The shipowner is therefore an insurer. Therefore, in accordance with the absolute character of the shipowner's liability, "a species of liability without fault," (*Seas Shipping Co.* v. *Sieracki, supra*), the District Judge was correct in finding the shipowner liable for petitioner's injuries.

The decision of the Fifth Circuit Court of Appeals therefore should be reversed.

Respectfully submitted,

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SEP 12 1953
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Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory Statement

This is an action at law brought by the petitioner, George V. Tawes, a compulsory Panama Canal pilot, in the United States District Court, District of the Canal Zone, Cristobal Division, to recover from the respondent, Cie. des Messageries Maritimes, damages for injuries sustained by Tawes when he fell on board the steamship *Grenoble,* on July 21, 1949. The *Grenoble* is a Liberty type vessel, then operated by respondent. The injury occurred while the vessel was tied up to the lock wall at Gatun Lock, waiting her turn to enter the chambers of that lock in the course of her transit of the Panama Canal from the Pacific to the Atlantic side.

The Pleadings

The complaint alleges (Article Seventh, R. 3), that upon arriving at the locks at Gatun, petitioner, in his capacity as pilot and in discharge of his duty, disembarked on the lock wall for the purpose of checking the ship's draft and on returning to board the vessel, and having arrived at the ship's rail, kept on descending to the ship's main deck by means of a portable step-ladder, belonging to, furnished and provided by respondent, and while on said portable step-ladder, and while so descending, said ladder slipped out from under petitioner causing him to fall on the ship's main deck and to fracture his right leg.

Article Twelfth of the complaint (R. 4-5) *specifically* charges respondent, "its agents, servants, and employees and each of them", with negligence in the following respects:

(1) "in that they failed and neglected to supply the" petitioner "with a safe means of boarding said vessel and a safe place in which to work";

(2) "failed to properly lash, fasten and secure the said step ladder";

(3) "failed to properly superintend and supervise the descending of" petitioner "on said step-ladder",

(4) "and further failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn" petitioner "of the impending dangers."

Article Fourteenth of the complaint (R. 5) charges respondent *generally* with negligence "by reason of the dangerous and defective means provided by" respondent

"for boarding said vessel and the negligence of the" respondent, "its agents, servants and employees".

The answer of respondent pleads a general denial of negligence and alleges, in substance, that petitioner's injuries resulted entirely from his own negligence, and from his own actions outside the scope of his duties as pilot.

The Proceedings Below

The case came on for trial before the Honorable Joseph R. Hancock, District Judge, without a jury, and was heard upon the aforementioned pleadings, the testimony of petitioner and of witnesses for both parties. On August 27, 1951, the Trial Judge rendered his Opinion holding respondent liable and fixing damages in the amount of $26,076.00. Judgment for petitioner was entered accordingly, on September 10, 1951.

The opinion of the Trial Judge, which is found in the Record at pages 22-23, contains no finding of any negligence upon the part of respondent, as charged by petitioner. Liability was predicated entirely upon a misapplication of the rule of *res ipsa loquitur,* the Trial Judge stating as follows (R. 25-26):

> "When Tawes undertook to use that same ladder to reboard the ship, the ladder *from some unexplained cause* fell, throwing Tawes to floor of deck. It is testified to by members of the Canal crew and crew of the Grenoble that the ladder with Tawes on it did fall, and that he received injuries as a result thereof.
>
> Under those facts, and under the elementary principles of law, the rule of Res Ipsa Loquitur applies. Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on Defendant. Defendant offered no proof

> to meet that burden, and in view of such failure the liability of Defendant has been sustained". (Italics ours.)

The Circuit Court of Appeals for the Fifth Circuit, in reversing stated (R. 259):

> "The record standing thus, and in the face of a finding that the ladder fell from some unexplained cause, the District Court invoked the rule of *res ipsa loquitur* and held that under that principle of law the burden of refuting any negligence causing the ladder to fall rested on appellant. This was error.
>
> The doctrine is not proof and does not supply a want of proof. * * *"

After quoting from *Sweeney* v. *Erving*, 228 U. S. 233, 240, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98-99, the Circuit Court of Appeals stated (R. 260):

> "We cannot say that the facts of the occurrence warrant the inference of negligence. Appellee 'did not consider the ladder unsafe'. He did not know and had no idea what caused the ladder to slide. And appellant contrary to the court's finding has met the burden of explanation by offering the ladder in evidence and by producing witnesses whose testimony tended to rebut any inference of negligence on its part.
>
> "The Court below found nothing wrong with the ladder in its structure or condition, it found only that it fell from 'some unexplained cause,' and having thus found in effect that the cause of the accident and the relation of the appellant to it were matters of mere speculation and conjecture imposed liability upon the defendant solely upon the doctrine of *res ipsa loquitur*. Since we cannot on this record determine how the injury to appellee occurred—it cer-

tainly was not established why the ladder fell—we are compelled to hold that the appellee failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to appellant's negligence".

Reasons Relied Upon for Allowance of Writ

The threefold reasons which are advanced by petitioner for allowance of a Writ of Certiorari (Petition 3), none of which is tenable, are as follows:

"(1) The decision of the Court of Appeals for the Fifth Circuit is contrary to the holding of this Honorable Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 U. S. 46.

(2) The Circuit Court of Appeals for the Fifth Circuit has misapplied the cases of *Sweeney* v. *Erving*, 228 U. S. 233, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

(3) The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings*, 195 Fed. 2d 291".

POINT I

The decision of the Court of Appeals for the Fifth Circuit is not contrary to the decision of this Honorable Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 U. S. 46.

Johnson was a libel in admiralty by a seaman who was injured on the SS "Mission Soledad" by a falling block. It appeared that he was assisting in securing a boom and, at the time he was injured, was engaged in an operation

known as "rounding in" blocks to bring two blocks of a block and tackle together. He was on the main deck, walking forward pulling on the hauling or "free" end, of a rope (which was attached to the block) while a shipmate, one Dudder, on the mecanno deck above and to his rear, held the block in his hands. Johnson would pull on the rope and coil the free part of the line thus accumulated, while Dudder, holding the block walked forward on the mecanno deck at a rate of speed controlled by Johnson. The rope had to be kept comparatively taut so that they would not foul. At all times before the accident Johnson had been able to pull freely on the line he was coiling and Dudder had not pulled back on the block or jerked Johnson's rope. The last thing that Johnson remembered before the accident was that he was bending over coiling the line on the deck.

The Trial Court found that Johnson had been injured by the block which was negligently and carelessly dropped by a fellow seaman. In an oral opinion the court ruled that the evidence showed *both negligence* and a case for the application of the doctrine of *res ipsa loquitur*.

The Circuit Court of Appeals modified, 160 F. (2d) 789, so as to eliminate the award of general damages on a negligence basis, allowing maintenance and cure only, stating, page 793:

> "Under these circumstances, with the actual cause of the accident totally unexplained, we cannot say that the 'facts of the occurrence warrant the inference of negligence' (Sweeney *v.* Erving, supra, note 6, page 240 of 228 U. S., page 418 of 33 S. Ct., 57 L. Ed. 815, Ann. Cas. 1914 D. 905) or '(that) the circumstances were such as to justify a finding' that the accident was the result of appellant's negligence. Jesionowski *v.* Boston & Maine Ry., supra.

"There is no presumption of negligence from mere proof of the accident (Sweeney *v.* Erving, supra, note 6, 238 of 228 U. S., 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D, 905. Smith *v.* United States, supra, note 4) and this is not a case where the 'circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened'. Sweeney *v.* Erving, supra, note 6, page 238 of 228 U. S., page 417 of 33 S. Ct., 57 L. Ed. 815, Ann. Cas. 1914 D. 905".

The Circuit Court of Appeals went on, page 794:

"We do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence' such as a derailment in the Jesionowski case, supra. * * *"

This Court, in an opinion rendered by Mr. Justice Douglas, reversed. It was stated, at page 48 of 333 U. S., 92 L. Ed. 471:

"The rule of res ipsa loquitur applied in Jesionowski *v.* Boston & Maine R. R. Co. (U. S.) supra, means that 'the facts of the occurrence warrant the inference of negligence, not that they compel such an inference'. * * * *We need not determine what the result would be if it were shown that petitioner was pulling on the rope when the accident happened. For the uncontradicted evidence is that he was not pulling on the rope but was bending over coiling it on the deck.* A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. *But where, as here, the injured person is not implicated* (Jesionowski *v.* Boston &

> Maine R. R. Co. (U. S.)), supra, the falling of the block is alone sufficient basis for the inference that the man who held the block was negligent. *In short, Dudder alone remains implicated,* since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible". (Italics ours.)

Mr. Justice Frankfurter in a strong dissent, in which he was joined by two other justices stated, page 53 of 333 U. S.:

> "I agree that if the rule of res ipsa loquitur determines this case, the scope of that rule is found in Sweeney *v.* Erving, 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416, Ann. Cas. 1914 D. 905, reaffirmed last term as a 'decision which cut through the mass of verbiage built up around the doctrine of res ipsa loquitur.' Jesionowski *v.* Boston & Maine R. R. Co., 329 U. S. 452, 457, 91 L. Ed. 416, 67 S. Ct. 401, 169 A.L.R. 947. But these two sentences are a vital part of the Sweeney Case: 'Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff'. 228 U. S. at 240. Therefore, even if the rule of res ipsa loquitur is here relevant, it should not by itself sustain a finding for the petitioner, 'for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof.' 288 U. S. at 238. Since we cannot tell from the record how the injury to the plaintiff occurred—it was certainly not established why the block fell—I cannot escape the conclusion that petitioner failed to sustain his burden of proof by a fair preponderance of the evidence that his injuries were attributable to the defendant's negligence. • • •".

Petitioner maintains that this case is ruled by the decision in the *Johnson* case because Tawes, like Johnson, was not implicated. The true fact is however, as found by the Trial Judge (R. 23) that *Tawes was implicated.* He had one foot on the ladder and was lifting his other foot for the next step, when the ladder moved or skidded from against the gunwhale. His own movements or actions and the mere weight of his body, formed a part of the occurrence and did implicate him, as Johnson was not implicated because nothing he was doing entered into dropping of the block whereas the slipping or falling of ladders without negligence on the part of anyone is not at all unusual, and in the myriad cases involving falls from ships' ladders of all sorts no court has ever yet considered the occurrence so extraordinary as to apply the rule of *res ipsa loquitur*. The opinion of this Court in *Johnson* pointed out that it considered it unnecessary to determine "what the result would be if it had been shown that" Johnson "was pulling on the rope when the accident happened", as in this case petitioner was descending the step-ladder when his accident occurred; and specifically noted that a man who is careful does not ordinarily drop a block on a man working below him—a situation quite different from the slipping of a ladder which the injured party is descending.

The citation of *Sieracki* by petitioner in his argument under this point is irrelevant, and is an obvious belated attempt to claim the benefit of the implied warranty of seaworthiness in a seaman's contract. Petitioner made no such claim in his pleading or in the courts below, and such a claim would have been groundless in the case of a compulsory pilot such as the petitioner. Moreover, it was not, and could not have been a ground for his application for the writ of certiorari.

POINT II

The Circuit Court of Appeals for the Fifth Circuit did not misapply *Sweeney* v. *Erving*, 228 U. S. 233, or *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

Petitioner charges that the Court of Appeals "obviously misapplied" *San Juan Light Company* and *Sweeney*, "as they have not taken into account this court's decision" in *Johnson*. But *Johnson* upholds *San Juan Light Company* and *Sweeney* with respect to the general principles of the rule of *res ipsa loquitur*, and is not contrary. Nowhere did the Circuit Court of Appeals hold that *res ipsa loquitur* was not applicable to the acts of a fellow servant—merely that the rule had no application to the circumstances of the case at bar. Indeed, petitioner, as a compulsory pilot, was not the fellow servant of any of the personnel of the vessel.

POINT III

The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is not contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings*, 195 F. 2d 221.

Cummings may be briefly disposed of. In that case a pilot was held entitled to recover from a vessel owner for personal injuries sustained while climbing a Jacob's ladder. However, there the ship's negligence was affirmatively found, and liability was not predicated, as in the case at bar, upon a misapplication of the rule of *res ipsa loquitur*. The decisions are not in conflict.

Petitioner seems to contend that the Trial Judge should have found negligence upon the part of the boatswain's

mate of the vessel with respect to the adjustment of the ladder. The fact remains that no such a finding of negligence was made—liability having been predicated solely upon a misapplication of the rule of *res ipsa loquitur*. Indeed, the Trial Judge found that it fell from "some unexplained cause". This contention obviously now comes too late.

Petitioner also seeks belatedly and without ground to invoke *Sieracki,* in order to recover without a showing of fault. It is submitted that the granting of petitioner's application depends solely upon whether the decision of the Circuit Court of Appeals is in conflict with *Johnson* or *Cummings,* or resulted from a misapplication of *Sweeney* or *San Juan Light Co.* Clearly, no such conflict exists, and there was no such misapplication.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

BARENT TEN EYCK,
EDWIN LONGCOPE,
SAMUEL T. FRANKEL,
Counsel for Respondent.

McNUTT & NASH,
Of Counsel.

SEP 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 235

GEORGE V. TAWES,
Petitioner,

versus

CIE. DES MESSAGERIES MARITIMES,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CICERO C. SESSIONS,
Counsel for Petitioner.

WOODROW DE CASTRO,
RICHARD B. MONTGOMERY, JR.,
ARTHUR B. HAMMOND, JR.,
VAN SICLEN, RAMIREZ & DE CASTRO,
Of Counsel.

CITATIONS CITED.

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SUPREME COURT OF THE UNITED STATES

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

On page nine of respondent's brief in opposition to petition for writ of certiorari there is the following statement:

"The citation of *Sieracki* by petitioner in his argument under this point is irrelevant, and is an obvious belated attempt to claim the benefit of the implied warranty of seaworthiness in a seaman's contract. Petitioner made no such claim in his pleading or in the courts below, and such a claim would have been groundless in the case of a compulsory pilot such as the petitioner."

We herewith quote the facts from *Seas Shipping Company vs. Sieracki*, 328 U. S. 85, 66 Sup. Ct. 872:

> "Sieracki was employed by an *independent stevedoring company* which was under contract to petitioner to load its ship, the S.S. Robin Sherwood. On December 23, 1942, he was on the vessel loading cargo. The winch he operated was controlled by a ten-ton boom at number five hatch. One part of a freight car had been lowered into the hold. The second part weighed about eight tons. While it was being put down the shackle supporting the boom broke at its crown, causing the boom and tackle to fall and injure respondent." (Italics ours.)

Therefore not a seaman but a stevedore was involved in the *Sieracki* case. Similarly in the case at bar a pilot is involved. If a stevedore is in the service of the ship under *Sieracki* certainly a pilot is in the service of the ship. The principles of law of the *Sieracki* case are therefore applicable here.

Also we would like to point out that respondent attempts to distinguish the case of *Johnson vs. U. S.*, 68 S. Ct. 391, 333 U. S. 46 from the case at bar on the grounds that Tawes was implicated by the mere fact that he had his foot on the ladder. The Court in the *Johnson* case obviously used the word implicated as meaning causing or being responsible for the accident. In other words the Court found that since Johnson did not cause the accident the falling of the block alone was sufficient basis for the inference of negligence. This is clear from the following quotation from the *Johnson* Case:

> "In short, Dudder alone remains implicated, since on the record either he or petitioner was the cause

of the accident and *it appears that petitioner was not responsible*". (Italics ours.)

The District Judge in his opinion found as follows:

> "This record contains no facts establishing that the injuries received by Tawes were the result of or produced by any contributing negligence of Tawes." (R. 25.)

And also the Court said:

> "The inquiry, however, is not as to possible causes of the accident but whether *a showing that petitioner was without fault* and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent." (Italics ours.)

Thus the District Judge found that Tawes was not at fault or responsible for the accident and therefore the boatswain alone remains implicated. The *Johnson* case is therefore squarely in point with the case at bar and should control.

Respectfully submitted,

CICERO C. SESSIONS,
Counsel for Petitioner.

WOODROW DE CASTRO,
RICHARD B. MONTGOMERY, JR.,
ARTHUR B. HAMMOND, JR.,
VAN SICLEN, RAMIREZ & DE CASTRO,
Of Counsel.

I certify that a copy of the above brief has been served on counsel for respondent by depositing same in the United States Mail properly addressed, postage prepaid, this date.

.... day of September, 1953.

.....

CICERO C. SESSIONS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953.

No. 235.

GEORGE V. TAWES,

Petitioner,

versus

CIE. DES MESSAGERIES MARITIMES,

Respondent.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

The petition of George V. Tawes, petitioner for writ of certiorari with respect shows:

I.

That the denial of the petition for writ of certiorari is prejudicial to the interest of your petitioner and a rehearing should be granted in this matter for the following reasons to-wit:

(1) That the doctrine enunciated by this case is contrary to the doctrine of *Seas Shipping Company v. Sieracki,* 328 US 85, 66 Sup. Ct. 872.

(2) That the decision in this case leaves an American pilot aboard a foreign vessel who is injured by the unseaworthiness of the vessel or the negligence of the crew without any recourse for his damages where he is unable to investigate and prove negligence by reason of his injuries and the sailing of the vessel. Therefore if the unexplained falling of the ladder in this case does not shift the burden of proof then many injustices will result in other cases particularly as to pilots, stevedores and government employees (such as public health and immigration officers).

Petitioner files in connection with this petition a brief in support thereof and for the reasons hereinabove set forth and amplified, a rehearing should be granted and finally the writ of certiorari prayed for should be granted.

WHEREFORE, petitioner, George V. Tawes, prays that this Honorable Court grant a rehearing and after a rehearing grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

CICERO C. SESSIONS,
Counsel for Petitioner.

WOODROW DE CASTRO,
RICHARD B. MONTGOMERY, JR.,
ARTHUR B. HAMMOND, JR.,
VAN SICLEN, RAMIREZ & DE CASTRO,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953.

No. 235.

GEORGE V. TAWES,

Petitioner,

versus

CIE. DES MESSAGERIES MARITIMES,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

In this case petitioner, a pilot, left the ship by means of a stepladder. This stepladder was on the vessel and provided by the vessel for this purpose. While he was off the ship the boatswain adjusted the stepladder. Petitioner on coming back aboard the ship was the first person to step on the ladder after its adjustment. When he did so step on the ladder, the ladder fell injuring him. We submit that this unexplained falling of the ladder shifts the burden of proof.

We are requesting this rehearing because we feel that we did not sufficiently stress the decision of *Seas Shipping Company v. Sieracki*, 328 U. S. 85, 66 Sup. Ct. 872 in our original petition and that this decision is a sub-

stantial ground for granting the writ which was not previously presented.

The *Sieracki* case involved a stevedore who was injured aboard ship when a shackle broke causing a boom and tackle to fall. The Court held in that case:

> "Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative, the importation of those common-law tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owners. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. *These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault.* Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> "(7) These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of

> responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S., 1157; Carlisle Packing Co. v. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy." (Italics ours.)

Now an American pilot hurt aboard a foreign vessel going through the Panama Canal and which vessel will be beyond his reach before he is able to even think about obtaining a lawyer to investigate the matter is certainly in a most helpless position and it is doubly harsh to force him to shoulder alone the resulting personal disability and loss. The doctrine of the *Sieracki* case in such a situation requires the putting of that burden in so far as it is measurable in money upon the owner regardless of his fault. As it was stated in the *Sieracki* case, the owner is in a position, whereas Tawes is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

The results of this decision can perhaps more graphically be seen by applying it to the Port of New York. Foreign ships come into this port in great numbers. American pilots go aboard and also United States gov-

ernment officials such as health officers, immigration officers and customs officials board her. If one of these persons is injured and the vessel sails before he can have an investigation made, this person will be forced to bear the burden of his personal and financial loss, simply because through no fault of his own he was unable to obtain sufficient proof of negligence.

Here Tawes was injured by the unexplained falling of the stepladder aboard a ship. This should in any event shift the burden of proof. But under the holding of this case a pilot who is injured badly on a foreign ship that is leaving immediately and who therefore can't make an investigation to prove negligence must bear the entire burden of the disability and loss. This is certainly a situation that the humanitarian policy laid down in the *Sieracki* case covers.

We therefore submit that this case should be reviewed in the light of the *Sieracki* case and that on the basis of the doctrine of that case the writ of certiarari should be granted.

CICERO C. SESSIONS,
Counsel for Petitioner.

WOODROW DE CASTRO,
RICHARD B. MONTGOMERY, JR.,
ARTHUR B. HAMMOND, JR.,
VAN SICLEN, RAMIREZ & DE CASTRO,
Of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

.....

CICERO C. SESSIONS.

I certify that the foregoing petition for rehearing and brief in support thereof were served on opposing counsel by depositing a copy of same in the United States Mail, properly addressed, postage prepaid this date.

.....

CICERO C. SESSIONS.